Supreme Court, U.S.
FILED
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No. 91-1759

IN THE

Supreme Court of the United States

October Term, 1991

EDWARD K. STASKUS,
Petitioner,

vs.

GENE WEISS PLACE FOR FITNESS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a litigant who is representing himself appears at the Courtroom where a hearing on a Motion for Default Judgment is scheduled and the Court holds the hearing in chambers while the litigant is present in the Courtroom, does the Trial Court violate the litigant's right to due process in denying the litigant's Civil Rule 60(B) Motion filed seven days after the judgment is journalized and containing evidentiary material satisfying the three-party requirement for Rule 60(B) Motions in relevant state case law?

2. When a party supports a Civil Rule 60(B) Motion with evidentiary material fulfilling the requirements of relevant state case law and the non-movant files no affidavits or other evidentiary material in opposition to the Motion, does the Trial Court violate the movant's right to due process in not holding a hearing on the Civil Rule 60(B) Motion?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED .. 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

The Court should grant the requested Writ to declare that when a litigant who is representing himself appears at a courtroom where a hearing on a Motion for Default Judgment is scheduled and the court holds the hearing in chambers while the litigant is present in the courtroom, that the Trial Court violates the litigant's right to due process when it denies the litigant's Civil Rule 60(B) Motion filed seven days after the judgment and containing evidentiary material satisfying the three-part requirement contained in relevant state case law 5

The Court should grant the requested Writ to declare that when a party supports a Civil Rule 60(B) Motion with evidentiary material fulfilling the requirements of relevant state case law and the non-movant files no affidavits or other evidentiary material in opposition to the motion that the trial court violates the movant's right to due process in not holding a hearing on the Civil Rule 60(B) Motion..... 12

CONCLUSION..... 13

APPENDIX:

Decision of the Supreme Court of Ohio A1

Decision and Journal Entry of the Court of Appeals, Cuyahoga County, Ohio (May 30, 1991) A2

Journal Entry of the Court of Common Pleas, Cuyahoga County, Ohio (October 20, 1987) A5

Journal Entry of the Court of Common Pleas, Cuyahoga County, Ohio (November 19, 1990).... A6

Order of the Supreme Court of Ohio Denying Rehearing (January 15, 1992)..... A7

Ohio Rule of Civil Procedure 55 ..... A8

Ohio Rule of Civil Procedure 60(B)..... A9

Letter of Edward Staskus Dated August 21, 1987..... A10

Motion for Relief from Judgment of Edward Staskus filed October 27, 1987 ..... A11

Plaintiff Gene Weiss Place for Fitness Response to Motion for Relief from Judgment (in Court File but not noted in Docket)..... A15

TABLE OF AUTHORITIES

Cases

Carr v. Charter National Life Insurance Company, 22 Ohio St. 3d 11, 488 N.E.2d 199 (1986) 9,10

Colley v. Bazell, 64 Ohio St. 2d 243, 416 N.E.2d 605 (1980) 9,10,11,13

Denton v. Pettycrew, 132 N.W.2d 156 (Sup. Ct. Mich 1965) 6,11

Ellingsworth v. Chrysler, 665 F.2d 180 (7th Cir. 1981) 6,11

Griffey v. Rajan, 33 Ohio St. 3d 75, 514 N.E.2d 1122 (1987) 10

GTE v. ARC Industries, Inc., 57 Ohio St. 2d 146, 351 N.E.2d 113 (1976) 7,8,10

Guillaume & Associates, Inc. v. Don-John Co., 371 N.W.2d 15 (Minn. App. 1985) 11

Mayhew v. McDougall, 491 P.2d 848 (Ariz. App. 1971) 9

Mullanè v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950) 6,7,13

Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 99 L. Ed. 2d 75, 108 S. Ct. 895 (1988) 5,6,7,13

R.F. v. D.G.W., 560 P.2d 837 (Sup. Ct. Colo. 1977) 8

U.A.P. Columbus JV326132 v. Plum, 27 Ohio App. 3d 293, 500 N.E.2d 924 (Franklin Cty. 1986) 12

Constitution

United States Constitution, Amendment XIV..... 3,5,13

Rules

Ohio Rule of Civil Procedure 55 (Please see Appendix)

Ohio Rule of Civil Procedure 60(B)..... 5,7,9,12

Other Authorities:

7 Moore, *Federal Practice*, 2d Ed., 1991, at 60-164..... 8

11 Wright and Miller, *Federal Practice and Procedure*, 1973, section 2857, at 160..... 8

32 Am. Jur. 2d, *Federal Practice and Procedure*, section 782, at 232..... 13

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IN THE

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EDWARD K. STASKUS,
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OPINIONS BELOW

The Decisions of the Supreme Court of Ohio appear in the Appendix, as do the Decision and Journal Entry of the Court of Appeals Eighth Judicial District, Ohio and the Journal Entry of the Court of Common Pleas, Cuyahoga County, Ohio.

JURISDICTION

The Decision of the Supreme Court of Ohio was entered on November 11, 1991. The Decision denying rehearing was entered on January 15, 1992. This Petition for Writ of Certiorari has been mailed within ninety days of the January 15, 1992, Decision on the Application for Rehearing. This Court has jurisdiction to grant this Petition under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional issues in this case arise under the Due Process Clause, Fourteenth Amendment of the United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a case in which the plaintiff-appellee Gene Weiss Place for Fitness ("Gene Weiss") sued defendant-appellant Edward K. Staskus ("Staskus") for taking and selling its membership list. The Complaint was served on Staskus on August 5, 1987. On August 25, 1987, Staskus filed with the Court and served on Weiss' attorney a letter indicating Staskus' intent to defend the lawsuit and to have the trial court appoint him a lawyer (App. A10).

On September 8, 1987, Weiss filed a Motion for Default Judgment which includes a certificate of service on Staskus. Staskus obviously also received notice of a hearing on October 16, 1987 at 9:15 a.m. since he was present in the Courtroom from 9:00 a.m. until 11:30 a.m. that morning (Affidavit of Staskus, A13-A14). Apparently Weiss' attorney obtained a default judgment in the amount of $131,500.00 in chambers that morning (App. A5). Staskus was first approached by the bailiff almost two hours after Weiss' attorney left, and told to get an attorney (Affidavit of Staskus, A13-A14). Staskus then filed his Motion for Relief from Judgment on October 27, 1987 (App. A11-A14). This Motion was denied in an entry dated November 19, 1990 (App. A6). Staskus filed his Notice of Appeal on December 14, 1990. The Eighth District Court of Appeals affirmed the lower court's judgment in a decision announced on May 30, 1991, and journalized on June 19, 1991 (App. A2-A4). The Ohio Supreme Court declined to take jurisdiction of the appeal on November 13, 1991 (App. A1), and on January 15, 1992, denied petitioner's Application for Rehearing (App. A7). This Petition followed.

REASONS FOR GRANTING THE WRIT

First Question Presented:

When a litigant who is representing himself appears at the Courtroom where a hearing on a Motion for Default Judgment is scheduled and the Court holds the hearing in chambers while the litigant is present in the Courtroom, does the Trial Court violate the litigant's right to due process in denying the litigant's Civil Rule 60(B) Motion filed seven days after the judgment is journalized and containing evidentiary material satisfying the three-part requirements for Rule 60(B) Motions in relevant state case law?

In the case of *Peralta v. Heights Medical Center*, 485 U.S. 80, 99 L. Ed. 2d 75, 108 S. Ct. 896 (1988), a hospital was granted a default judgment in Texas state court on a hospital bill against the employer-guarantor of the bill although the employer was never served personally with a copy of the Complaint. The employer thereafter filed a bill of review proceeding to set aside the default judgment, asserting that the lack of personal service caused the judgment to be void, regardless of whether the employer had a meritorious defense, and that he had no notice of the judgment. *Peralta, supra,* at 81-82. The hospital filed a motion for summary judgment on the bill of review, claiming that a meritorious defense needed to be substantiated before the default judgment could be vacated. The trial court agreed and granted the summary judgment. On rehearing in the trial court the employer re-cast his argument in federal constitutional terms under the Fourteenth Amendment with no better luck. *Ibid.*, at 83. The Texas appellate courts afforded the employer-guarantor similar treatment, but on appeal this

Honorable Court reversed the Texas courts, quoting from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 2d 62, 70 S. Ct. 652 (1950):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections."

Peralta, supra, at 84.

In the present case petitioner Edward Staskus responded to the notice of the default hearing by showing up at the correct courtroom, but unbeknownst to him the hearing on the default judgment took place in the judge's chambers. Certainly if the legacy of the *Mullane* case is to survive and have meaning then a notice which does not tell a party exactly where to go does not give him "an opportunity to present his objections," *Cf. Mullane, supra,* at 314; *Cf. also Ellingsworth v. Chrysler,* 665 F.2d 180, at 185 (7th Cir. 1981), and *Denton v. Pettycrew,* 132 N.W.2d 156, at 157-58 (Sup. Ct. Mich. 1965), both *infra* at 11. Procedurally, the case offered here for review is identical to *Peralta, supra.* Substantively, the present case is not on an account for a fixed sum like *Peralta* but instead involves a cause of action for conversion of property with no established market value (Affidavit of Staskus, App. A13-A14). The perfunctory granting of the judgment herein for $131,500.00 is thus much harder to justify. Especially when, unlike the *Peralta* case, the petitioner herein gave the Court notice in his correspondence of August 21, 1987, that he would contest liability in the case (App. A10). The notice received by petitioner herein was in fact no more effective than the lack of notice to Mr. Peralta.

It is fairly common knowledge that default judgment practice is casual at best and oftentimes sloppy. Based on the foregoing substantive and procedural facts this case affords this Honorable Court a vehicle to put a beneficial and needed gloss on the *Mullane* and *Peralta* cases.

The following discussion shows basically that even under Ohio law petitioner should have been granted relief from judgment. Interestingly, the Second Question Presented touches on the establishment by a movant of a meritorious defense, something which in *Peralta, supra,* was intertwined with the question of adequate notice in the Texas courts. *Peralta, supra,* at 81-83.

> "To prevail on a motion brought under Civil Rule 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civil Rule 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.
>
> Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits."

GTE v. ARC Industries, Inc., 57 Ohio St. 2d 146 (1976).

> "Where the district court has the power to act, pursuant to the provisions of Rule 60(b), relevant propositions and factors that it may consider in exercising its discretion are: the general desirability that a final judgment should not be lightly disturbed; the procedure provided by Rule 60(B) is not a substitute for an appeal; the Rule should be

> liberally construed for the purpose of doing substantial justice; whether, although the motion is made within the maximum time, if any, provided by the Rule, the motion is made within a reasonable time; if relief is sought from a default judgment or a judgment of dismissal where there has been no consideration of the merits, whether in the particular case the interest of deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgments, and whether there is merit in the defense or claim, as the case may be;"

7 Moore, *Federal Practice*, 2d Ed., 1991, at 60-164.

> "The cases calling for great liberality in granting Rule 60(b) motions, for the most part, have involved default judgments. There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits."

11 Wright and Miller, *Federal Practice and Procedure*, 1973, section 2857, at 160.

With relation to the authority cited above, it should be noted that the judgment taken by plaintiff-appellee Gene Weiss Place for Fitness, Inc. ("Gene Weiss") against defendant-appellant Edward Staskus ("Staskus") was a default judgment. However, unlike *GTE v. ARC Industries, supra*, the present case does not involve a complaint on an account (*i.e.*, the present case requires a more careful consideration of the merits), nor was Staskus represented by counsel. It has been observed that where a party is not represented by counsel that a Court should be reluctant to grant a default judgment. *R. F. v. D.G.W.*, 560 P.2d 837 (Sup. Ct. Colo. 1977).

All four of the authorities cited above indicate a preference that cases be decided on their merits whenever possible. In the present case there was probably little or no consideration of the merits since the judgment granted by the trial court was in the amount of the prayer. *Cf. Mayhew v. McDougall,* 491 P.2d 848, at 853 (Ariz. App. 1971).

It is axiomatic that a Motion for Relief from Judgment should not be used as a substitute for appeal. In the present case, the hearing on the Motion for Default Judgment was on October 16, 1987, the default judgment was journalized on October 20, 1987, and the Rule 60(B) Motion for Relief from Judgment was filed on October 27, 1987. Therefore, there is no question that the Rule 60(B) motion filed by Staskus was a substitute for an appeal which would have been untimely.

> "The movant's burden is to allege a meritorious defense, not to prevail with respect to the truth of the meritorious defense."

Colley v. Bazell, 64 Ohio St. 2d 243, fn. 3 at 247 (1980).

> "When the evidence presented at a default judgment hearing is insufficient to support the damages awarded, the trial court abuses its discretion when it denies a Civil Rule 60(B) motion to the extent that the motion challenges the amount of the award."

Carr v. Charter National Life Insurance Company, 22 Ohio St. 3d 11 (1986).

In *Carr v. Charter National Life Insurance Company, supra,* a purchaser of a mobile home sued a credit life insurance company when it only paid approximately one-half of the balance due on a mobile home loan upon the death of one of the purchasers. *Carr, supra,* at 11-12. When the defendant-insurance company repeatedly failed

to respond to discovery requests a default judgment was granted the plaintiff in the amount of the prayer, an amount roughly twenty times the balance of the loan.

The trial court and the Court of Appeals denied defendant's motion to set aside the default judgment. On further appeal, the Ohio Supreme Court found that the record of testimony taken at the hearing on the motion for default judgment did not support the award of $200,000.00 in compensatory damages. *Carr, supra,* at 13.

In the present case, despite the presumption of regularity of proceedings in the lower court, doubts as to the sufficiency of the supporting evidence are raised by a judgment in the total amount of $131,500.00 ($100,000.00 punitive, $31,500.00 compensatory), which is the exact amount prayed for in the Complaint, where the judgment itself only refers to "the evidence" (App. A5). Such doubts should be resolved in favor of the motion to set aside the judgment. *GTE v. ARC Industries, supra,* at 146. Particularly so where the judgment is in such a large amount. *See Colley v. Bazell, supra,* fn. 5 at 249; also *Griffey v. Rajan,* 33 Ohio St. 3d 75, at 83-84 (1987) (J. Wright, dissenting).

Defendant-appellant's Staskus defenses as set forth in his affidavit attached to his Motion for Relief from Judgment contest the claim by plaintiff-appellee that defendant-appellant sold the memberships wrongfully (Count 1) and that the membership list had monetary value (Count 2) (App. A13-A14).

In the present case Gene Weiss' only response to Staskus' Motion for Relief from Judgment filed on October 27, 1987, was a memorandum filed on or about November 9, 1990. Under such circumstances Staskus has undoubtedly alleged a meritorious defense, as required by *Colley, supra,* fn. 3 at 247.

> "The factors to be considered in determining whether to grant a default judgment are substantially the same as those to be considered on a motion to vacate a default judgment."

Guillaume & Associates, Inc. v. Don-John Co., 371 N.W.2d 15, at 18 (Minn.App. 1985).

The question whether Staskus' inadvertence, mistake or neglect was excusable

> "must of necessity take into consideration all the surrounding facts and circumstances."

Colley, supra, at 609.

As shown in Staskus' affidavit attached to his Motion for Relief from Judgment (App. A13-A14), in this case the surrounding circumstances include the conduct of the trial court and specifically the bailiff on the morning of the default hearing. The reasonable inference from Staskus' affidavit is that no one employed by the Court inquired as to who he was or why he was in Court that morning. In this context, Staskus' failure to attend the hearing was excusable. At least one Court has noted with approval the practice of "searching the Courtroom" for the non-movant before granting a default judgment. *See Denton v. Pettycrew*, 132 N.W.2d 156, at 157-58 (Sup.Ct. Mich 1965).

So, in the present case there was honest confusion or misunderstanding over where the hearing or the default judgment would take place. This is comparable to the situation where there is a misunderstanding as to when a hearing would be held. *See Ellingsworth v. Chrysler*, 665 F.2d 180, at 185 (7th Cir. 1981).

Second Question Presented:

When a party supports a Civil Rule 60(B) Motion with evidentiary material fulfilling the requirements of relevant state case law and the non-movant files no affidavits or other evidentiary material in opposition to the Motion, does the Trial Court violate the movant's right to due process in not holding a hearing on the Civil Rule 60(B) Motion? (See Plaintiff's Response to Motion for Relief from Judgment, in Court File but not entered in Docket, App. A-15-A17).

> "However, where grounds for relief from judgment appear on the face of the record, a court abuses its discretion and may not overrule the motion unless it first makes a factual determination of the alleged grounds for relief adverse to the movant. *Matson v. Marks, supra,* paragraph six of the syllabus. In other words, if movant's Civil Rule 60(B) motion contains allegations of operative facts warranting relief, the trial court should grant a hearing to take evidence and either discredit or verify these facts before ruling."

U.A.P. Columbus JV326132 v. Plum, 27 Ohio App. 3d 293 (Franklin Cty. 1986).

The evidentiary material set forth in Staskus' affidavit attached to his Motion for Relief from Judgment establish excusable neglect, mistake and inadvertence as grounds for relief as well as meritorious defenses to the issues of wrongful sale and also damages (See App. A13-A14). The trial court clearly should have conducted a hearing on the Motion for Relief from Judgment.

CONCLUSION

It seems that in the one and a quarter centuries since the Fourteenth Amendment was adopted that individuals and institutions have turned it on its head and used it as a road map to economic success. Whether it's unbargained for increases in utility rates or insurance premiums, tax bracket creep, computerized stock trading or unjustified interest rates on credit cards, the average American has his or her rights to due process violated on a daily basis. In the *Mullane* and *Peralta* cases this Honorable Court has stood for the principle that, at least in Court proceedings, the American citizen has the constitutional right under the Fourteenth Amendment to notice and an opportunity to be heard prior to suffering the "serious consequences" of an adverse judgment. *See Peralta, supra,* at 85. Such concern can only be heightened by the fact that the present case deals with a default judgment in the amount of $131,500.00. The Ohio case law is clearly in favor of giving such a judgment debtor the benefit of the doubt. *See Colley v. Bazell, supra,* fn. 5, at 249. The simple fact pattern (a non-represented litigant sitting unaware in the courtroom while a default judgment is granted in chambers) makes the case ideal for review. The result reached below was patently unfair (a judgment for the amount of the prayer, $131,500.00, based on "the evidence" (see Judgment Entry of Cuyahoga County Common Pleas Court, Appendix, at A5), in a case of conversion of personal property with no established fair market value). For these reasons this case should be reviewed by this Court. See generally 32 Am. Jur. 2d, *Federal Practice and Procedure*, section 782, at 232.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

ENTRY OF THE SUPREME COURT OF OHIO

(November 13, 1991)

Case No. 91-1528

THE SUPREME COURT OF OHIO

GENE WEISS PLACE FOR FITNESS, INC.,
Appellee,

v.

EDWARD K. STASKUS,
Appellant.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Mark D. McGraw.

(Court of Appeals No. 61019)

/s/ THOMAS J. MOYER
Chief Justice

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT

(Dated May 30, 1991)

No. 61019

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

GENE WEISS PLACE FOR FITNESS, INC.,
Plaintiff-Appellee,

vs.

EDWARD K. STASKUS,
Defendant-Appellant.

ACCELERATED DOCKET
JOURNAL ENTRY AND OPINION
PER CURIAM

May 30, 1991

Civil appeal from Court of Common Pleas
Case No. 129,793

JUDGMENT AFFIRMED.

PER CURIAM:

This cause came on to be heard upon the accelerated calendar pursuant to App. R. 11.1 and Loc. R. 25, the records from the Cuyahoga County Court of Common Pleas and the briefs of counsel.

The trial court did not abuse its discretion in denying appellant's motion for relief from judgment. Appellant failed to submit factual material which, on its face, demonstrates that he is entitled to relief. *GTE Automatic Electric, Inc. v. ARG Industries* (1976), 47 Ohio St. 2d 146. Appellant's affidavit did not demonstrate excusable neglect as required by Civ. R. 60(B)(1). Rather, appellant attacks the appropriateness of the default judgment, alleging that appellant was present in the courtroom the day and time of the default hearing, but was later informed by the court's bailiff that the default judgment had already been granted, apparently in the court's chambers. A motion for relief from judgment is not a substitute for a direct appeal from the judgment challenged. *Colley v. Bazell* (1980), 64 Ohio St. 2d 243, 245.

Judgment affirmed.

This cause is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/ FRANCIS E. SWEENEY
P.J.

/s/ PATRICIA A. BLACKMON
J.

/s/ SARA J. HARPER
J.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the Court and time period for review will begin to run.

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Dated October 20, 1987)

Case No.: 129793

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GENE WEISS PLACE FOR FITNESS, INC.,
Plaintiff,

vs.

EDWARD KESTUTIS STASKUS,
Defendant.

JUDGMENT

JUDGE THOMAS O. MATIA

Upon application of the Plaintiff for judgment by default, the Defendant having failed to plead or appear in the action, and upon the pleadings and the evidence, the court find the motion well taken.

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff recover from the Defendant the sum of Thirty-One Thousand Five Hundred Dollars ($31,500.00) for compensatory damages and the amount of One Hundred Thousand Dollars ($100,000.00) for punitive damages with interest and costs.

/s/ JOHN P. THOMAS
JOHN P. THOMAS
MAYNARD & THOMAS CO., L.P.A.
Attorney for Plaintiff
5045 State Road
Parma, Ohio 44134
(216) 842-7500

/s/ THOMAS O. MATIA
JUDGE THOMAS O. MATIA

JOURNAL ENTRY OF CUYAHOGA COUNTY COMMON PLEAS COURT

(Filed November 19, 1990)

Case No.: 129793

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GENE WEISS PLACE FOR FITNESS, INC.,
Plaintiff,

vs.

EDWARD KESTUTIS STASKUS,
Defendant.

Motion for Relief from Judgment, filed 10/27/87, is denied.

/s/ CAROLYN B. FRIEDLAND
Judge

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated January 15, 1992)

Case No. 91-1528

THE SUPREME COURT OF OHIO

GENE WEISS PLACE FOR FITNESS, INC.,
Appellee,

v.

EDWARD K. STASKUS,
Appellant.

REHEARING ENTRY

(Cuyahoga County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 61019)

/s/ THOMAS J. MOYER
Chief Justice

OHIO RULE OF CIVIL PROCEDURE 55(A), (B)

Rule 55. Default

(A) Entry of judgment. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

(B) Setting aside default judgment. If a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B).

OHIO RULE OF CIVIL PROCEDURE 60(B)

RULE 60. Relief from judgment or order

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

LETTER OF EDWARD STASKUS DATED AUGUST 21, 1987

August 21, 1987

17517 Fries Av.
Lakewood, OH 44107

John Thomas
Maynard & Thomas Co., LPA
5945 State Road
Parma, OH 44134

Dear Mr. Thomas:

You and I and Mr. Weiss know that Case No. 87-129793-CV is frivolous, and that Weiss's club suffered no damage as a result of my actions.

What I did was wrong, regardless of the wrongs Gene Weiss had done me previously. I'm sorry I let him affect me.

Since I am required to file this with the court, as well as inform you, I am at this time requesting that the court appoint a lawyer for my defense, as I cannot afford the services of one myself.

Knowing Weiss's highly developed sense of revenge, I am sure we will be meeting in court.

Signed,

EDWARD STASKUS

MOTION FOR RELIEF FROM JUDGMENT OF EDWARD K. STASKUS

(Filed October 27, 1987)

Case No. 129793

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GENE WEISS PLACE FOR FITNESS, INC.,
Plaintiff,

vs.

EDWARD KESTUTIS STASKUS,
Defendant.

HON. THOMAS O. MATIA

MOTION FOR RELIEF FROM JUDGMENT
O.R.C.P. 60(B)(1)

Now comes the defendant, Edward K. Staskus, and he moves for relief from judgment based on the facts in the attached affidavit which shows that 1) defendant has a meritorious defense to present if relief is granted; 2) defendant is entitled to relief under Ohio Rule of Civil Procedure 60 (B)(1) on the grounds of inadvertence and mistake; and 3) that the within motion is timely made. *GTE Automatic Electric v. ARC Industries* (1976), 47 OS2d 146, 351 NE2d 113.

Respectfully submitted,

/s/ EDWARD K. STASKUS
Edward K. Staskus, Pro Se
17517 Fries Avenue
Lakewood, Ohio 44107
Defendant

SERVICE

A copy of the foregoing Motion with attached affidavit was served on John P. Thomas, Esq., Attorney for Plaintiff, 5945 State Road, Parma, Ohio, 44134, this 24th day of October, 1987, by regular U.S. mail.

/s/ EDWARD K. STASKUS
Defendant, Pro Se

AFFIDAVIT

STATE OF OHIO }
CUYAHOGA COUNTY } SS:

Now comes the affiant, Edward K. Staskus, and being first duly sworn, he deposes and says as follows:

1. A hearing on plaintiff's Motion for Default Judgment in this case was set for October 16, 1987, at 9:15 a.m.;

2. I was present in Judge Thomas O. Matia's courtroom from 9:00 a.m. until approximately 11:30 a.m.;

3. I saw plaintiff's attorney and an employee of plaintiff in said courtroom at 9:15 a.m. on October 16, 1987. They left the courtroom at 9:30 a.m. or 9:40 a.m. and never came back;

4. About 11:30 a.m. the judge's bailiff came into the courtroom. I asked him when the default hearing would take place and he said a default judgment had already been granted the plaintiff.

5. About five minutes later the bailiff came back into the courtroom and told me to contact an attorney regarding the default because an attorney would know what to do;

6. Regarding the allegations of the Complaint, I never intentionally or fraudulently sold plaintiff's memberships wrongfully, and I never received any money or other benefits because of such alleged sales. Further, the membership list which I allegedly converted had no value and was of no use to anyone; and

7. As of October 16, 1987, I had no attorney to represent me or advise me in this matter.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ EDWARD K. STASKUS
Edward K. Staskus

SWORN TO AND SUBSCRIBED BEFORE me this 24th day of October, 1987.

/s/ MARK D. MCGRAW
Notary Public
State of Ohio—Cuyahoga County
My Commission Does Not Expire

PLAINTIFF'S RESPONSE TO EDWARD STASKUS' MOTION FOR RELIEF FROM JUDGMENT

(In Court File but not entered in Docket)

Case No. 129793

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GENE WEISS PLACE FOR FITNESS,
Plaintiff,

vs.

EDWARD K. STASKUS,
Defendant.

JUDGE FRIEDLANDER

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Now comes GENE WEISS PLACE FOR FITNESS, by and through their Attorney JERRY L. MAYNARD on behalf of JOHN P. THOMAS, deceased and in response to Defendant's Motion for Relief from Judgment states the following:

1. A Complaint was filed on May 21, 1987 with the Cuyahoga County Court of Common Pleas being Case No. 129793.

2. Service was obtained on August 5, 1987 and the answer day was September 2, 1987.

3. The Defendant having failed to plead or otherwise defend as required by the Civil Rules, a Motion for Default Judgment was filed by Plaintiff's Attorney on September 8, 1987.

4. A Motion for Default Judgment hearing was set for October 16, 1987 before Judge Thomas O. Matia. Judgment was at that time granted to the Plaintiff and recorded on the docket being October 20, 1987 Reference-Journal No. 990 Page 257 in the Cuyahoga County Clerk of Courts.

5. On October 24, 1987, the Defendant filed an Answer and a Motion for Relief from Judgment.

6. On December 7, 1988, the Plaintiff's Attorney requested a Certificate of Judgment for Transfer.

7. On December 7, 1988, Plaintiff's Attorney filed a Certificate of Judgment for Transfer and a Examination Before the Judge with the Cleveland Municipal Court. Service was not obtained. Plaintiff's Attorney filed an Alias Examination Before the Judge on January 24, 1989 with no service.

8. On October 10, 1989, a Body Attachment was filed by Plaintiff's Attorney.

9. On or around October, 1989, Defendant's Attorney, MARK MCGRAW filed a Motion to Stay Execution and Entry of Appearance.

Plaintiff, GENE WEISS PLACE FOR FITNESS by and through their Attorney, JERRY L. MAYNARD having filed Pleadings according to law is entitled to a Judgment on the record against the Defendant, EDWARD K. STASKUS in this matter and that the Motion for Relief from Judgment filed by the Defendant should not be granted.

Respectfully submitted,

/s/ JERRY L. MAYNARD
Jerry L. Maynard
Attorney for Plaintiff
5945 State Road
Parma, OH 44134
(216) 842-7500

SERVICE

A copy of the foregoing has been mailed to Mark D. McGraw, Attorney for Defendant at 800 Standard Building, Cleveland, OH 44114 by Regular U.S. Mail on this 7th day of November, 1990.

/s/ JERRY L. MAYNARD
Jerry L. Maynard
Attorney for Plaintiff